No. 86-1638

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LEE ENTERPRISES, INCORPORATED, a Delaware Corporation and DONALD SCHWENNESEN,
Petitioners,

v.

WARREN E. SIBLE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent Sible disagrees with the accuracy and completeness of Petitioners' Statement of the Case. Sible's Statement of the Case shall supplement the facts found in the Montana Supreme Court's majority opinion. Finally, Petitioners have ignored Schwennesen's and Mason's (his editor) testimony relative to actual malice.

Petitioners allege that the "core" of the December 29th article was Salisbury's notarized statement. This document was purportedly given to the Governor of the State of Montana by Robert Stephens. Schwennesen admitted

he knew that the statement had been prepared with the help of his personal friend, Robert Stephens. Tr. at 542. Schwennesen testified he knew Stephens disliked Sheriff Rierson's administration. Tr. at 718. More importantly, Schwennesen admitted it occurred to him that Stephens had an unjustified "axe to grind." Tr. at 718. Prior to the statement's creation, Schwennesen informed Stephens that the document was necessary for a story in the newspaper. Tr. at 700. Schwennesen knew Salisbury's statement resulted from Stephens' encouragement. Schwennesen admitted "obvious reasons" to question Stephens. Tr. at 715, 533.

Mason was aware of the genesis of the Salisbury statement before publication, having discussed Schwennesen's social relationship with Stephens and Stephens' encouragement of Salisbury. Tr. at 740. Schwennesen testified he had no prior experience with Salisbury, describing him as a "completely unknown source". Tr. a 540, 566.

Schwennesen testified that Salisbury told him to contact Christian about the truth of the charges and also said Christian would be open and honest. Tr. at 1845. Both Schwennesen and Mason knew Salisbury had misgivings about the charges and therefore had requested Christian be contacted to confirm the truth or falsity of the allegations before publication. Tr. at 836. Schwennesen admitted Salisbury stressed Christian's importance in determining the validity of the allegations. Tr. at 575. Schwennesen further told Salisbury he would carefully investigate the charges' validity before an article was published. Tr. at 659.

Salisbury's statement also accused Deputy Dale Walter of taking a coin while investigating a crime. Plaintiff's Exhibit Number 5. Christian was identified by the statement as an eye-witness to this event. *Id.* Schwennesen contacted Walter before publication about Salisbury's accusation (Tr. at 1852) and, testified that Walter's strong denial of the coin charge gave him obvious

reason to doubt the truth of Salisbury's statement. Tr. at 735, 736.

Schwennesen spoke with Sible twice before the article was published. A copy of the first conversation was taped at the Flathead County Sheriff's Office and a transcription was introduced into evidence. The transcription is attached, beginning at page 1a of the Appendix to this Brief.[1] Regarding all charges, Sible also implored Schwennesen to contact Christian before publication.

Both Schwennesen and Mason testified they were aware that both principals to this dispute requested Christian be contacted to determine the truth or falsity of Salisbury's charges. Tr. at 783, 833, 834. Schwennesen testified he had ample time to contact Christian before publication. Tr. at 1929, 1930. Mason testified that the decision not to contact Christian before publication to determine the truth or falsity of the charges was intentional. Tr. at 1964. Schwennesen testified that he and Mason had obvious reason to suspect that the two smok-

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[1] Petitioners' assertion that Sible admitted to Schwennesen in the telephone conversation that he had Eckerson's smoker is not clear from the transcript of Schwennesen's December 3rd discussion with Sible. Eckerson's name was not mentioned during that discussion. Although Sible admitted he had possession of *a smokehouse* given to him by Bob Brandewie, it was not clear that Sible, at that time, connected Eckerson's smoker to the one given him by his friend. Moreover, the transcription clearly reveals that Sible (as did Salisbury) told Schwennesen to contact Christian to verify the truth or falsity of the accusations. Thus, both principal disputants asked Schwennesen to contact the co-investigating officer on the "smoker caper" before printing Salisbury's allegations. Mark Holston, the news director of the local TV station, testified that when a reporter is asked by both principals to a dispute to contact a particular party and fails to do so, that reporter recklessly disregards the truth or falsity of the allegations under the circumstances. Tr. at 233-234, 237. Holston's testimony seems in accord with the facts, rationale and result of the Ninth Circuit's decision in *Alioto v. Cowles Communication, Inc.*, 519 F.2d 777 (9th Cir.), *cert. den.*, 96 S.Ct. 280 (1975).

ers at issue were not the same before publication. Tr. at 605, 614-616, 630-631, 737, 742, 853, 1864, 1867-1868, 1914, 1933-1934, 1953, 1965.

Petitioners testified that they had obvious reasons to doubt Salisbury's veracity and the accuracy of his charges because they questioned his motives, knew he was emtionally mixed-up and knew he was a vindictive, disgruntled ex-employee. Tr. at 540-541, 552-553, 554, 562, 566, 574-576, 614-615, 659, 673, 678, 679, 682-683, 686, 687, 695, 697, 703, 714-715, 718, 724, 729, 735, 738, 764, 838, 853, 948-952, 990-991, 1003, 1792-1793, 1823, 1842-1843, 1845, 1852-1853, 1862, 1864, 1900.

Schwennesen and Mason never formed a good faith belief that Salisbury's charges were true, in spite of questioning the validity of those charges. *Id.*, see also, Tr. at 695. Schwennesen and Mason discussed the story and concluded that,

> "[W]ell, Max Salisubry had raised a lot of questions for Don that he wanted time to check out and we agreed that there was no need to get [the article] into the paper [immediately] and that it was *important* to talk to some of the *other people*".

Tr. at 1952. (Emphasis added). Despite Schwennesen's concerns and the warnings from his source and Sible to contact John Christian about the truth or falsity of the charges, Schwennesen made a purposeful decision not to contact Christian.

Contrary to Petitioners' assertion, the facts contained in the Montana Supreme Court's majority opinion are supported by the record, including Schwennesen's and Mason's testimony. The record in this case is extensive. It is beyond the scope of this Statement of the Case to set forth all facts supporting actual malice in complete detail. With the testimony and admissions of Schwennesen and Mason before it, the Montana Supreme Court

rendered its opinion which remanded this case for a new trial.

Petitioners contend in footnote number 3 that Sible does not dispute the accuracy of Schwennesen's reporting. This is a misstatement. Sible disputes Schwennesen's accuracy in reporting the contents of Salisbury's statement.

Petitioners' Statement of the Case also omits several of Sible's theories of actual malice. In addition to those theories set forth in footnote number 8, Sible also argued publication of a *known falsehood* because the article claimed Sible was put in charge of his own investigation and therefore implied that he was actually aware of the investigation while it was ongoing. See Brief of Appellant at 37-40. More importantly, the Petitioners have neglected to inform this Court that Sible argued a theory of actual malice from Schwennesen's testimony that he had "obvious reasons" to doubt Salisbury's truthfulness and the accuracy of Salisbury's report. *Id.* at 42-43. Sible's theory was therefore based directly on *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968). Finally, Sible's theory of actual malice included Schwennesen's intentional failure to cross-check the allegations with Christian after being informed to do so by his source. The theory of actual malice presented in this respect is set forth in *Alioto v. Cowles Communication, Inc.*, 519 F.2d 777 (9th Cir.), *cert. den.*, 96 S.Ct. 280 (1975) and is buttressed by the Colorado Supreme Court's decision in *Kuhn v. Tribune-Republican Pub. Co.*, 637 P.2d 315 (Colo., 1981).

Under the backdrop of this record, the Montana Supreme Court reversed and remanded this case for a new trial on two grounds. The Montana Supreme Court held that the jury instructions were defective and that Schwennesen's failure to produce his notes under the

Montana "Shield Law" was prejudicial to Sible's case on actual malice.[2]

ARGUMENT

I. THIS COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI BASED ON THE NECESSITY OF A RETRIAL TO EXAMINE SCHWENNESEN'S NOTES AND THEIR EFFECT.

The Montana Supreme Court noted Petitioners and Sible raised many issues but only two were dispositive. One of the dispositive issues related to a matter of pure state law—whether Schwennesen's notes were protected by Montana's "Shield Law".

In *Herbert v. Lando*, 441 U.S. 153 (1979), this Court held that it would not impose an additional First Amendment restriction on discovery in public official libel cases.[3]

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[2] Petitioners concede in footnote number 10 that the Montana "Shield Law" question is relevant to a determination of actual malice. Schwennesen's notes are relevant to what he actually knew at the time of publication. Such information bears on Schwennesen's publication of material known to him to be false or his reckless disregard of the truth under known facts. Whether or not Schwennesen's notes were protected, however, is purely a matter of state law as it applies to this Petition. In *Herbert v. Lando*, 441 U.S. 153 (1979) this Court refused to extend a First Amendment privilege to discovery matters similar to the one at issue. Consequently, the Montana Supreme Court was free to hold that Schwennesen's notes were not protected under our "Shield Law" privilege. The result of this holding is that this case will have to be retried on the question of actual malice because the record is incomplete. Sible has a right to review Schwennesen's notes and question him about them before a jury. Since Sible was denied proper discovery by the district court's error in the first trial, a new trial on the question is required. Consequently, this record is not yet ready for this Court's review.

[3] Sible has consistently contested being designated as a public official for purposes of the theft of the smokehouse charge. Sible continues to contest such designation. However, for purposes of the discussion of this Brief, Sible will assume, *arguendo*, that he

In *Herbert v. Lando*, this Court recognized the importance of demonstrating that a defamer had "reason to suspect his publication was false" to establishing actual malice. 441 at 152.

To establish actual malice, the knowledge of the defamer at the time of publication is critical. A libel plaintiff must be able to determine what the defamer knew at that time to prove the defamer made a knowingly false statement or recklessly disregarded the truth. The Petitioners have rightly not argued that the Montana Supreme Court erred in its determination under Montana's "Shield Law" as a matter of Constitutional Law. Consequently, Sible did not have vital discovery information before him necessary to his proof of actual malice. The Montana Supreme Court remanded this case for a new trial based on that lack of information. Since the information contained in Schwennesen's notes and an examination of Schwennesen about that information is extremely important to any jury's determination of actual malice, this case will have to be retried.

Thus, a new record on actual malice will be generated. Sible has the right to examine Schwennesen's notes and to question that reporter about them. We do not know what the notes show. It is entirely conceivable that the notes will demonstrate Schwennesen actually knew Salisbury's statement was false, but decided to unjustifiably assassinate Sible's character anyway.

As a result of the trial court's error in not allowing Sible to examine Schwennesen's notes during the first trial, the record on actual malice which will eventually determine the outcome of this case will be changed. In other words, this Court does not now have before it a final record. For this reason alone, the Petition for a Writ of Certiorari should be denied.

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is an "all purpose public official", required to prove actual malice to recover any damages under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

II. THIS COURT SHOULD NOT REINSTATE THE JUDGMENT IN FAVOR OF PETITIONERS, SUMMARILY OR OTHERWISE.

As noted in the preceding section of this Brief, the Montana Supreme Court was free to determine that our state "Shield Law" was incorrectly applied by the trial court and resulted in Sible being improperly denied access to Schwennesen's notes. Since the First Amendment does not preclude such a decision, and because those notes are extremely relevant to the question of actual malice, a retrial must occur in any event. If this Court were to accept Petitioners' suggestion of complete reversal and reinstate the judgment in Petitioners' favor, this Court would not only encroach on areas left to the states but would erode its holding in *Herbert v. Lando*. By implication, a reversal which reinstated the judgment of the trial court without a new trial would hold that reporters' notes are protected from scrutiny even where state law does not grant such a privilege in a particular case.

Petitioners' suggestion would also deny Sible his due process right to fully present his case to a jury because evidence to which he is entitled would be denied him. Thus, Petitioners' suggestion that this Court reinstate the trial court's judgment without a new trial is extremely inappropriate and disregards Montana's right to determine what evidentiary privileges shall be extended to a reporter in a defamation case.

III. THE MONTANA SUPREME COURT ACCORDED INDEPENDENT REVIEW ON THE ISSUE OF ACTUAL MALICE.

As Petitioners correctly noted, it was Sible (not them) who directed the Montana Supreme Court's attention to their duty under *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). *Bose* requires a reviewing court to make its own independent judgment on the rec-

ord to determine if actual malice with convincing clarity is or can be present.

Sible maintains that this is exactly what the Montana Supreme Court did in this case. As the opinions clearly demonstrate, the Montana Supreme Court's majority version of the facts conflicts with those set forth by Justice Hunt in his opinion, which concurs in the reversal. It is submitted that the diversity of the presentation of the facts from the two opinions evidence an independent review of the actual malice question as required by *Bose*. Justice Hunt even states in his concurring opinion:

> "I concur with the majority opinion concerning the jury instructions given by the Court and I concur in the reversal of the action on that basis. However, I do not agree with the majority that *the facts are as clear as they present them.*"

Petitioners' Appendix at 9a. (Emphasis added). This diversity of opinion regarding the facts establishes that an independent review of the record on actual malice did occur. For this reason, Petitioners' suggestion that the Montana Supreme Court failed in its constitutional duty is without merit.

The Petitioners have also suggested error under *Bose* because, in the context of examining a jury determination to see if Plaintiff's case was presented properly by the instructions, the Montana Supreme Court reviewed the evidence "in a light most favorable to the Appellant [Plaintiff]". Petitioners apparently suggest that the application of any presumption is foreclosed by *Bose* in an appellate court's review of the record on the ultimate Constitutional issue of actual malice.

This Court's recent decision in *Anderson v. Liberty Lobby, Inc.*, 466 U.S. 485, 106 S.Ct. 2505 (1986) would militate against the conclusion that an appellate court cannot apply any presumptions in conducting a review of the record on actual malice to determine if the jury was properly instructed. In delivering the Opinion of this

Court, Justice White reasoned that the "clear and convincing" standard of evidentiary proof must be considered in determining whether summary judgment should be granted in a public official libel case on the actual malice issue. Justice White further observed, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". 106 Sup.Ct. at 2513.

When reviewing jury instructions, a court must determine if the plaintiff's case was properly presented to the jury. The inquiry is akin to whether or not the plaintiff can sustain his case on consideration of a motion for summary judgment. Applying *Anderson*, the Montana Supreme Court was free to view the evidence in a light favorable to Sible. Contrary to Petitioners' assertion, the obligation of "independent review" is still tempered with traditional presumptions and inferences as is demonstrated by Justice White's observation that in actual malice summary judgment motions, the evidence must still be viewed in the traditional light favoring the non-movant.

Most importantly, however, the Montana Supreme Court's majority version of the facts is fully supported by the record. That version, and the conclusion that Petitioners knew Salisbury's charges were highly suspect, is supported by Schwennesen's and Mason's testimony at trial.[4]

Consequently, the Montana Supreme Court did conduct an independent review of the record. Moreover, being cognizant of this Court's mandates in *Bose* and *Anderson*, the Montana Supreme Court concluded, by implication, that sufficient evidence exists in the record for a reason-

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[4] Indeed, based on the admissions and testimony of Schwennesen and Mason, Sible argued to the Montana Supreme Court that actual malice was established by the Petitioners' testimony as a matter of law. Brief of Appellant at 32-54.

able and properly instructed jury to find that Sible has established actual malice with convincing clarity.

The Montana Supreme Court's review of this record supports the conclusion that Petitioners knew Salisbury's charges were "highly suspect". The underlying facts of that conclusion are not "imagined" as Petitioners suggest on page 8 of their Brief but are rather based on Schwennesen's and Mason's admissions and testimony. This Court should deny the Petition for a Writ of Certiorari.

IV. THE MONTANA SUPREME COURT'S OPINION IS CONSISTENT WITH *ST. AMANT* v. *THOMPSON*.

A public official libel plaintiff must prove actual malice, in addition to all elements under state law, to recover damages. The First Amendment requirement that actual malice be demonstrated was, of course, set forth in this Court's landmark decision in *New York Times Co. v. Sullivan*, 378 U.S. 254 (1964).[5] The element of actual malice simply means that a public official plaintiff cannot recover for libel unless he demonstrates with con-

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[5] In his Brief opposing a rehearing by the Montana Supreme Court, Sible suggested that it was time for this Court to re-examine its decision in *New York Times Co. v. Sullivan*. Although Sible feels that a re-examination of the *New York Times Co.* actual malice rule would be premature in this case at this time (the record in this case being insufficiently developed without a retrial which includes the opportunity to examine Schwennesen's notes and question him regarding the same), Sible wishes to preserve, throughout this case, his position that the actual malice rule of *New York Times Co.* should be re-examined and possibly overruled by this Court, allowing public officials to constitutionally recover damages under traditional concepts of defamation. Since this case will have to be remanded for retrial because of the district court's error which improperly denied Sible discovery of Schwennesen's notes and the opportunity to examine him regarding the same as a matter of state law, Sible has declined at this time to file a Cross-Petition for a Writ of Certiorari on this question.

vincing clarity that the defamer published a known falsehood or recklessly disregarded the truth or falsity of his publication.

Contrary to Petitioners' assertion, this Court's decision in *St. Amant v. Thompson*, 390 U.S. 727 (1968) did not require Instruction number 12 to be given because that instruction elaborates on the element of actual malice and is therefore prone to confuse the jury. Justice White recognized that reckless disregard in a First Amendment context "cannot be fully encompassed in one infallible definition" in *St. Amant.* 360 U.S. 730.

For instance, in *Alioto v. Cowles Communications, Inc.*, the Ninth Circuit concluded that actual malice could be inferred from the authors' intentional decision not to contact a key source from whom they might have learned that the statements they made about Alioto were false.

The question before this Court is not whether the Montana Supreme Court overruled *St. Amant.* The question is whether a jury must be instructed in all refinements of the law of actual malice.

The Montana Supreme Court reaffirmed the rule in *New York Times Co.* The Montana Supreme Court held that Sible must establish actual malice with convincing clarity to recover in this action. However, the Montana Supreme Court correctly noted that Instructions numbers 12 and 13 confused the jury. Neither instruction sets forth the definition of actual malice, which is simply publishing a known falsehood or recklessly disregarding the truth. In other words, by adding the elaboration through the instructions, the Montana Supreme Court concluded that the jury could become confused about what actual malice meant.

The Petitioners have failed to realize the true meaning of the Montana Supreme Court's Opinion. The operative paragraph of the Opinion is:

> "The erroneous instructions may very well have influenced the outcome of this case. Schwennesen and his editor *had reason to believe* that Salisbury's statement *was highly suspect.* Schwennesen failed to interview Christian, who would have told him that *the statement was without any substance or merit. The Missoulian* published Salisbury's statement *without fully investigating* and therefore, without *actually knowing* the statement was false. Under the instructions of the court, the jury could have found that *The Missoulian was reckless in failing to investigate* but nevertheless found there was no malice because *The Missoulian* did not entertain serious doubts about the actual truth of the statement. Upon remand, the court will instruct upon the proper standard *without embellishment.*"

Petitioners' Appendix at 7a. (Emphasis added).

What the Montana Supreme Court was saying with this reasoning is that many types of conduct may constitute actual malice under the circumstances of a particular case, and a jury can (and did in this case) become confused by embellishment on the proper standard. This case presents an analogous situation to *Alioto v. Cowles Communications, Inc.* The record demonstrates that Schwennesen had every reason to believe that Salisbury's statement was suspect. Both Salisbury and Sible told Schwennesen that Christian would confirm or deny the truth or falsity of Salisbury's charges. Schwennesen purposely and deliberately decided not to contact Christian even though he could have done so. Schwennesen therefore did not directly learn that the statement was false. However, his purposeful disregard of both his source's and his target's warnings to contact the man who could shed light on the truth or falsity of the article constitutes reckless disregard for the truth.

The Montana Supreme Court's formulation of the *New York Times Co.* rule of actual malice as a non-confusing jury instruction is based on a rationale which is com-

pletely consistent with *St. Amant v. Thompson.* The language of *St. Amant* indicates that where a newspaper's source is highly suspect or the newspaper has good reason to suspect that the charges it is intending to publish are false or inaccurate, publishing without investigating the charge is actual malice because the publisher is put on notice of probable falsity. When the publisher ignores such notice, his actions constitute reckless disregard for the truth or falsity of the charge.

The problem with the trial court's instructions was that they confused the jury and resulted in an erroneous verdict on the Constitutional element. Sible argued that if Instructions numbers 12 and 13 were to be included the trial court should also give an instruction based on *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967) and *Alioto v. Cowles Communications, Inc.*,[6] to prevent the jury from being confused into thinking that actual malice was precluded by Sible's case.

The Montana Supreme Court saw the confusion of the jury and held that the phrasing of Instructions numbers 12 and 13 might have allowed the jury to conclude that the law *required* them to find that actual malice did not exist, where the newspaper knew its source and information were highly suspect but, published without investigating and therefore with reckless disregard under the circumstances. Contrary to their assertion, Petitioners' construction flies in the face of *St. Amant.* Where a newspaper has obvious reason to suspect the veracity of its source and the accuracy of his report and publishes without an investigation which includes contacting the one person whom both the source and the target state can verify the truth or confirm the falsity of the charges,

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[6] This Court's attention is also again directed to *Kuhn v. Tribune-Republican Publishing Co.,* 637 P.2d 315 (Colo., 1981). The facts of that case, where actual malice was found to be demonstrated with convincing clarity, are akin to the facts of Sible's case.

that newspaper acts with actual malice under the *New York Times Co.* standard.

Consequently, the opinion of the Montana Supreme Court is in accord with the requirements of *St. Amant.* The Petition for a Writ of Certiorari should be denied.

V. THE PETITIONERS' ARGUMENT THAT ACTUAL MALICE UNDER THE RECORD NOW BEFORE THIS COURT CANNOT BE DEMONSTRATED BY CLEAR AND CONVINCING EVIDENCE IS PREMATURE.

The Montana Supreme Court obviously did not see this case and record in the same light as the Petitioners have represented it to this Court. What is more surprising is that Petitioners suggest that this Court summarily conclude that clear and convincing evidence of actual malice is lacking and thereby deny Sible a new trial. The absurdity of Petitioners' contention in this regard is apparent. On one hand, Petitioners argue that independent review of the record is required under *Bose* and, on the other hand, Petitioners argue that this Court ought to disregard its decision in that case and rule merely on Petitioners' Brief.

Obviously, Sible feels the record conclusively demonstrates actual malice based on the clearest and most convincing evidence possible—Schwennesen's and Mason's testimony at the trial. However, the Petitioners have missed the point and the effect of the Montana Supreme Court's ruling on the "Shield Law". The effect is, of course, that this case will have to be retried because of a discovery error and, therefore, we do not yet have a final record on the issue.

After Sible has obtained Schwennesen's notes and has an opportunity to question him about them, this Court may have a completely different record regarding actual malice. We do not know what the impact of Sible's additional inquiry will be on a jury or the record.

Sible will not argue those record facts which establish actual malice with convincing clarity out of Schwennesen's and Mason's mouths in this Brief opposing the Petition for a Writ of Certiorari. Such an argument would be premature. The record will be changed by evidence and testimony adduced after Schwennesen's notes are examined. Consequently, the Petitioners' argument that malice cannot be shown in this case by clear and convincing evidence is, at the very least, premature. This Court should deny the Petition for a Writ of Certiorari.

CONCLUSION

For reasons stated herein, this case is not ready for this Court's review. This case will have to be retried because, as a matter of Montana law, the trial court improperly denied Sible access to important, discoverable information on the actual malice question. Consequently, the record is not complete on the Constitutional issue.

Further, the Montana Supreme Court did not err in requiring the jury to be instructed that actual malice under *New York Times Co.* is publishing with knowledge that the charges are false or with reckless disregard for the truth or falsity of the report. The Montana Supreme Court was correct in holding that the trial court's embellishment on the *New York Times Co.* standard confused the jury. The Montana Supreme Court's formulation of the actual malice rule in the context of this case is in accord with *St. Amant v. Thompson.*

Finally, a reading of the full opinion of the Montana Supreme Court clearly establishes that it conducted an independent review of the actual malice question. The standard used by the Montana Supreme Court to conduct that review is in accord with this Court's Opinions in *Bose* and *Anderson.* Although the Petitioners would like this Court to believe that the Montana Supreme Court "blindly accept[ed] the plaintiff's version of the facts", [Petition for Writ of Certiorari at 9], most of those facts

are taken directly from the admissions and testimony of Schwennesen and Mason at trial. The majority opinion of the Montana Supreme Court conducted an independent review and concluded the record in this case can establish actual malice with convincing clarity.

Respondent Sible respectfully urges this Court to deny the Petition for a Writ of Certiorari for reasons set forth in this Brief.

Respectfully submitted this 27th day of May, 1987.

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APPENDIX

APPENDIX

TRANSCRIPTION OF TAPED PHONE INTERVIEW BETWEEN DON SCHWENNESEN AND WARREN SIBLE

Date of Interview: December 3, 1982

Date of Transcription: January 27, 1983

(For the purpose of clarity, (P) stands for Personnel of the Sheriff Department; (D) stands for Don Schwennesen, and (W) stands for Warren Sible).

(P) The following call came off of Tape 25 at the time of 8:22 and 11 seconds, Line 2.

(Phone ringing and answered)

(P) Flathead Sheriff's Office.

(D) Hi, Don Schwennesen calling from the Missoulian again. Is the Sheriff in this morning?

(P) No, he's not. Would you like his secretary?

(D) Yea, or is Warren Sible in?

(P) I'll check that for you, just one moment.

(D) Okay, thank you.

(W) Hello.

(D) Is this Warren Sible?

(W) Yes, it is.

(D) This is Don Schwennesen calling from the Missoulian.

(W) Yes, Don.

(D) I am sorry to bother you yesterday morning.

(W) You caught me bad—I was really sick.

(D) Yea, okay, I hope that you are feeling better.

(W) Yes I am.

(D) Well, I don't have anything that will make you feel better, but I wanted to tell you that a former detective from the Department, Max Salisbury, has raised some questions about an incident that allegedly involved you. This happened several years ago and it involved a smoke house that was allegedly taken from a former game warden.

(W) Yea, I know all about it.

(D) Okay. They feel—well Salisbury feels that he made an effort to investigate this and that the investigation was essentially covered up.

(W) Well, I will tell you what happened.

(D) Okay.

(W) Well at this time, it wasn't investigated and it wasn't covered up. What happened was, this was like 14 years ago or 13 years now, I guess—this former game warden—a friend of mine by the name of Bob Brandewie and I were out hunting and, we go to the woods down by Echo Lake and we came out on, you know, it was a piece of property. There was this old little thing sitting there, I mean, an old, an old, I guess that it was a smoke house. So there was a number up there—the property was up for sale, and that was about the only thing that was left on the property. So I told Bob, I said, "Bob, do you know who owns this?" and he says, "No, he says I know the guy that owns it". I said, "I wonder, Bob, if I could buy that from him". So I called the number that was there and it was his wife and she says, "My husband and I are divorced and I wouldn't be able to tell you one way or the other, you would have to contact him". So Bob says, "Hey Warren," (You know I told him

later what had transpired—cause he asked me about it) and Bob says (he owned the Mountain Lake Tavern at that time) "he came in there all of the time and he was quite a drinker." And Bob jumped him about it—asked him about it and he gave it to Bob Brandewie—*gave it to him.* Okay it was about a year later, Bob gave it to me because he had built himself another one. Now, consequently, they come up and say, hey, I stole the smoke house, which was, you know, its completely unfounded.

(D) Okay.

(W) And that is what the extent of that.

(D) Why do you suppose this game warden would have made the allegation?

(W) Well, see, I don't, I don't know why. In fact, I wonder why, if, he never did contact me or anybody else, you know, why wait 14 years?

(D) Um-Huh.

(W) That's kind of, kind of—really. It doesn't. You see, Bob Brandewie has consequently died of a heart attack here four or five years ago now. And, I never even questioned Bob or anything else about it. But, Bob says that he was in there drinking one night and he asked him about it and he says, "Oh, hell, he says, I've moved out, my wife and I got divorced," he says, "you can have it, Bob". Well, like I said, it was about a year later, Bob gave it to me because he had built himself another one.

(D) Um-Huh.

(W) So, but I didn't take it, I didn't. You know, like I said, I got it from a completely indifferent party as far as I am concerned. But, Max seems to feel that I took it. Why he made this allegation is, the way I've heard it, is that because I had called

his wife and asked her about it, they assumed that that I took it.

(D) Okay. Um-Huh.

(W) So, that is what I heard.

(D) Um-Huh.

(W) So I don't know why after 14 years he didn't—why all of a sudden he stepped forward now and felt that if it was some problem, he should have contacted me right away.

(D) Yea. Yea.

(W) The problem with Max Salisbury is that Max is really striking out against a lot of people in the Department—well, the election, and . . . Max, when he walked out of here, he didn't walk out of here in the best of terms. You know, he was the next best thing from being fired because of his activity with married women in the Company.

(D) Do you have any specifics on that?

(W) You know, I hate to give and take. You know what you are doing—you stir shit here and stir shit there—Well, the specifics on that were that we had a meeting in the Detective Division with Max Salisbury. He was confronted with this problem and his old partner, who worked with him for two years—two and one-half years—said, "Hey, yea, Max is carrying on personal business with married women or unmarried women while he was working". The Detective came to me when I took over the Division and said, "Hey, Warren I can't work like this. You got to do sometihng about it." I took it up with the Sheriff, the Sheriff confronted Max with it, and he denied it. But then we had a meeting with just the guys in the Detective Division and Johnny, his partner, confronted him in

front of all of us with this and he says, "Okay, if that is the way you guys feel, I'm going to go to Patrol Division". So . . . and then consequently he went to Patrol and then he left because he was—Max had quite a history of problems in here, but nothing, you know, nothing that—like I say, everything at this point is strictly heresay.

(D) Yea. Yea.

(W) It's nothing to make—you know, I don't want to—you know, Max's personal life and what is going on with his stuff is, but that's the background behind that. Max is still pretty upset about that, because he still blames me for him losing his job here.

(D) Well, you know, as a matter of fact, he volunteered some information on that to me and he felt that the incident that was raised by John Christen involved the case that he was on and Christen knew all about the background of it.

(W) No, there was a number of cases about—there wasn't cases, even, they were just . . . Well what happened and there were about five or ten or fifteen—and this was kind of an ongoing thing with Max. He had a little problem with women. And, ah, it had been going on for quite a time, but Johnny, a very good friend of Max, did not want to say anything. Then when I took over Detectives and Sudderston left, Max came—er—Johnny came to me and says, "Hey, I've got to do something about this, Warren, I can't contain him". But here had been cases, isolated cases with Max going back after work with young ladies with their husbands, where they were getting divorces, and he'd stay there all night and supposedly guard them and—a whole bunch of—it gets into real depth. And there is your background for that. But like I said, I prefer that you didn't, you know,—there is noth-

ing more to be said about that, its water under the bridge but . . . .

(D) Well, you know, if he persists in these allegations against you and the Sheriff, some of this odd stuff may have to come out.

(W) Well. . . .

(D) Do you have specifics on that to back it up?

(W) On what?

(D) On these incidents.

(W) If we had, if we had to dig into it, we could, yes, it could be done. But, as I said, I don't feel that its worth the problem, you know. I really don't. I don't think that its good for Max. He's remarried now. He's got a wife, just had a new baby. Oh, I don't think. . .

(D) I thought that he was married to the same woman.

(W) Well, what he did is, actually Max is guilty of incest—or not incest, of bigamy, because he married this other girl before he was divorced from the one he's got.

(D) Um-Huh.

(W) Yes, definitely. The divorce was not final and he went out and married this other girl.

(D) Did he subsequently divorce her, then, too?

(W) Well, he kinda did. From what I understand, he did, and then he got back together with her and I understand that they are remarried at this time.

(D) Um-Huh.

(W) And they just had a baby so, you know, Max, Max has had more than his share of problems, I feel, and think things left just left alone, you know.

(D) Um-Huh.

(W) The guy made his choice, so let him, let him do to. But Max feels that Al and myself kinda—well he didn't—Max quit—Max wasn't fired.

(D) Yeah, I understand that.

(W) You know, he could have been. But Al gave him the prerogative because the guys in Detective mentioned it along with Max. Max, we had a meeting in there one morning, and says, "Hey, I—if you guys all feel I'm doing this, I don't, you know, I don't want to work in here with you guys". So he went to Patrol and then consequently, he quit.

(D) Yea, Yea.

(W) But, this was an ongoing thing for a number of years. I think the person you might talk to is Johnny Christen, he is the one that worked with him. But, like I said, I prefer that you didn't say I told you to come to him or whatever, you now.

(D) Yea.

(W) It's, its, its all, its bull-crap what it is.

(D) Well, I'll tell ya. Max feels pretty strongly about it, as you probably realize, and he's, I believe—understand he has already signed a sworn notarized statement.

(W) Oh, yea. It went to the County Commissioner's, it went to the Clerk and Recorder's, it went to District Court, went to everything, but it was looked into and they said, 'Hey, you know, why 14 years later?' and with the consequences that surrounded it, they said, 'Say, there is no validity to it whatsoever'.

(D) Yea, well his feeling is that even though the statute of limitations is run out, at least the guy could have gotten his smoker back if it was unjustly taken from him.

(W) Yea, well shit, all he had to have done is come and ask me for it.

(D) Yea.

(W) And, he never did that.

(D) Um-Huh.

(W) You know, I never knew about the fight.

(D) Um-Huh. So . . .

(W) And, he has never contacted me, never, even after, I guess Max talked—talk to Johnny about this, Christen, because Johnny was with Max when they investigated this. And, John Christen says the only reason he did that was to trump up something on me.

(D) Um-Huh. Is that right?

(W) That's very true. I figure if you check that out that would be verified.

(D) Um-Huh.

(W) That was the reason why.

(D) What was the motive for that, anyway.

(W) Well, he don't like me. Because, see, I had struck out against him because he wasn't doing his work here at the Office. He wasn't keeping up with the rest of the case load, and then I started checking to find out why. Well then I found out all his—every case load that John, er, Max Salisbury's fact lead, we tracked it, we've got it all recorded. It's all down.

(D) Um-Huh.

(W) Every case that he worked on in the course of, oh, let's see, it would have been a year and one-half that I supervised him, ah, Max Salisbury's clear-

ance rate—everybody else's runs about oh pretty close to 50% of the cases cleared, Max Salisbury's was ten (10).

(D) Um-Huh.

(W) So, you know, Max just, he wasn't getting the job done the way he was supposed to so he felt we were stepping on him, everybody.

(D) Well, yea, he felt, specifically, that he was getting a large percentage of cases that were basically "dead-end".

(W) Well, . . .

(D) No witnesses, no leads, nothing.

(W) If you would like to stop in here, I'll show you how that system works, and I think that will enlighten you, because we do it on a rotary basis. Every day, the cases come in. Okay, I review every case every morning and of the ones that are assigned to the detectives, it's on a rotational basis, every day. Now like today, if I assign Jim Mitchell a case then . . . or let's say there are two of them —I will assign Jim Mitchell and maybe Maxine; on the next day, would be Rick Hawkes, Doc Harkins, Johnny Christen, Max Salisbury, and it goes on a rotational basis. So it doesn't make any difference, you know, he felt that, I know that, but the cases, all the other guys had the same shot as he did at the cases.

(D) Um-Huh.

(W) So. . . .

(D) They all got to work on the same cases.

(W) No, no, it was on a rotational basis. If it was your turn to get assigned to a case whether it was a

homicide, whether it was a major burglary or major robbery, he was assigned it.

(D) Yea, yea.

(W) But Max never did clear anything, but he didn't work at it.

(D) Do you have records of which particular cases went to people?

(W) Oh, yea.

(D) Do you still have those?

(W) Oh, yea, I got them.

(D) Even on Salisbury too?

(W) Ahhhh, I think the Sheriff does. I don't keep them.

(D) If you had three or four cases a day and several detectives a day, how would you. . .

(W) Well, I can . . . see, I've got my book here and I can show you how I work it. You know, some days we have maybe two, three or four cases and some days six, eight. Mondays is usually a heavy case load. And, it is strictly rotational.

(D) Yea.

(W) So, I know Max has done, really made a big stink about this and he hates Al with just a passion. He didn't feel that Al was very fair to him and all. But I think if you check with the guys in the Department, you will find out where Max is coming from. He's got a little problem. I feel sorry for the boy, I really do. And, there was a letter wrote to, ah, wrote to Max Salisbury in reference to this, . . in fact, he even went to the Union with it because he was mad about it . . . stating that we had had a meeting, and that it was for him to be known that his case load was not holding up to what the

other detectives were and that this was only to enlighten him to the fact we were taking a look at it and that for him to do accordingly what he felt had to be done. He even fought against that. He just wouldn't do it. I think the best thing for you to do is check with the other detectives.

(D) Um-Huh.

(W) And, get their feelings, if they'll talk to you.

(D) Who, most particular, would you recommend that I talk to?

(W) I think Johnny Christen.

(D) Okay.

(W) He worked with him for two (2) years. But, John may not tell you anything.

(D) Um-Huh.

(W) I think that Johnny will probably . . could tell you more than anybody because he worked one-on-one with him every day. But it was his whole point—and, Max was really upset about that—when John came forward and squealed on him.

(D) Yea, he was.

(W) But John said, 'Hey, I'm not covering up for him any longer'.

(D) Um-Huh.

(W) So . . . do you see the wheels? How they are turning?

(D) Yea. You know, what you say sounds very reasonable and plausible, and what he says sounds very reasonable and plausible, so . . .

(W) Well, we've got—yea, that's the way it's been around here.

(D) Yea.

(W) That's the way things have really been and Al, in trying to be fair, you know, didn't want to fire Max, well number one (#1) he had no grounds to, for firing Max, you know.

(D) Well, if the guy wasn't keeping up his case load.

(W) Well, no, that doesn't, no, nope, nope, that's not grounds. See there is only specific things that you can be fired from this job for.

(D) Um-Huh.

(W) They are still sleeping on duty, direct negligence of your duties—you know, you've got courts and all kinds of stuff—you've got to show cause. So, Al didn't want to do that to Max. See, Al' been a, as far as I am concerned—I worked—this is my third Sheriff, fourth Sheriff and of all the sheriffs that have been in here, he was the best administrator going, and he felt that, well because Max wasn't doing a good job in Detectives, maybe a change of scenery, you know, back into Patrol might do him some good. So, that was his, his, his conception on that. Well, Al's biggest enemy was himself because basically, he is pretty easy, trying to be fair.

(D) Um-Huh.

(W) So, he probably could have been, in a lot of cases, been a lot tougher on a lot of people, but . . .

(D) Yea.

(W) But, Al tried to keep it on an even keel says, "hey, you do your job, what you're supposed to do, and I'm not going to give you any trouble. You just get out there and do what the taxpayers are paying the money for".

(D) Yea.

(W) That, basically, has been pretty much the ballgame.

(D) Yea. Well, to continue, Max feels very strongly about this. He's, as I said, put a statement out with a thing—put his name out there and he feels very strong that the newspaper should write a story about this, you know, detailing this cover-up, alleged cover-up, and so I would like to know what I can say of what you've told that I can say, you know, to give valid to this thing.

(W) I think that, I think that that is kind of up to you guys. Because I feel, I feel this way, that's what transpired and you can check with the Sheriff, you can check with Johnny Christen, and myself, I feel if it comes out in the paper, due to nonvalidity meant, that that's libel on my part—that is putting me in a libel position, and I will surely pursue legal counsel on that.

(D) Okay.

(W) With both, with Max and the paper, if necessary.

(D) Okay. Um-Huh.

(W) That's my, you know, my stand of it.

(D) Okay.

(W) So, I feel that, you know, I have no control over the things of what Max Salisbury feels and is very put out about the way that he was treated here. You know, if that was the case, anybody—there is a lot of stuff that could be said that isn't, and if it all came to light, poor Max would end up on the bad of the stick and I don't think he wants that all put in the paper.

(D) Um-Huh.

(W) I, number 1 (#1) wouldn't even contemplate doing that to him.

(D) Um-Huh.

(W) So, what it does is it takes away from a lot of a person's character. Max has been here really a long time, he's got a lot of friends, and I'm sure that it would have some impact on his future jobs.

(D) Um-Huh.

(W) So, I don't think that is the way to handle things.

(D) Yea. Okay. I think that I will probably talk to Max again and discuss our conversation.

(W) Yea.

(D) And advise him of what you have told me and see if he wants to pursue this.

(W) Oh, well, you know. . . but, I think before you put anything in the paper, you better be talking to the Sheriff and the Commisisoners, and the Clerk and the Court because it was all recorded and everything.

(D) Right, yea. Which of the Commissioners would you suggest that I talk to?

(W) I don't know. A copy of it went over there.

(D) Yea. Yea

(W) But, ah, I, as I said, you know, it was 14 years later and it was—I think if you get a hold of Johnny Christen, he will explain it to you why Max did that, he was pissed at me and that is the reason for striking out. So, and John's a pretty straight shooter.

(D) Um-Huh.

(W) Very.

(D) Alright.

(W) Okay.

(D) Tell me, is the Sheriff in at this point?

(W) No he's not. . .

(D) Okay.

(W) That I know of.

(D) I want to talk to him about this too, but. . .

(W) Okay.

(D) I'll call back a little bit later.

(W) Okay. (D) Thank you very much, Warren.

(W) You bet, bye-bye.

(D) Bye-bye.

(At this point, the phone is hung up at both ends).